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Supreme Court of the United States

OCTOBER TERM, 1965

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA,

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Pursuant to Rule 42 of the Rules of this Court, and with consent of the parties, the National Association of Manufacturers of the United States of America respectfully presents this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The National Association of Manufacturers is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises, located throughout the United States and its territories. These concerns range from the very small to the very large and represent about 75 percent of the industrial employment in the United States. Most of these business enterprises engage in interstate commerce and are therefore subject to the provisions of the National Labor Relations Act, and their industrial relations are affected by the policies of that Act and decisions made thereunder.

The Association has an interest in this case by reason of the substantial effect, both immediate and potential, that the decision of the Court of Appeals for the District of Columbia Circuit will have upon the Association's members. The Association seeks to emphasize the far-reaching effect of this decision, to point out its serious impact upon industrial relations, community relations, and the maintenance of law and order in all communities where the Association's members are in business. It also seeks to demonstrate that the decision is inconsistent with the purposes and policies of the National Labor Relations Act.

The first question presented by the petition in this case relates to the right of an employer to discharge employees for engaging in assaults and other violence, mass picketing, blocking access to the employer's premises, mob demonstrations at the homes of non-strikers, and other illegal, improper, and unprotected conduct

in connection with a labor dispute. It is on this question that the Association believes it can make a special contribution as *amicus curiae*. Limitation of this brief to the first question, however, is not intended to detract from the importance and merit of the second question presented in the petition which we believe also merits review by this Court.

ARGUMENT

This case arises from a strike at Kohler Co. which began in 1954 and extended over several years. The company discharged 90 employees for directing, controlling, and engaging in acts of violence, aggravated incidents of mass picketing at the plant, mob demonstrations and threats at the homes of non-striking employees, and similar improper conduct. The National Labor Relations Board found that these employees had engaged in such conduct and were discharged for that reason. Accordingly, it denied them reinstatement.

On remand from the Court of Appeals for the District of Columbia Circuit, the Board was still of the view that these employees had engaged in such conduct and were discharged for that reason, but it ordered most of them reinstated on the "balancing" of conduct theory suggested by the Court of Appeals in its decision remanding the case.

The Board broadly ordered reinstatement of employees who had engaged in various types of misconduct, in two groups as set forth below.

1. The Board ordered reinstatement of those "who were discharged only for engaging in or directing and controlling the mass picketing, for participating in the

home demonstrations, for participating in the employment office picketing, or for a combination of such activities." (Supp. J.A. 2359)

The mass picketing referred to had been described by the Board in its earlier decision as "conduct that has been commonly called 'belly to back' picketing" which was "effective in preventing ingress to or egress from the plant," and during which "in many instances the pickets refused to permit entrance to the plant property despite requests of the police to let the workers into the plant." (*Kohler Co.*, 128 NLRB 1062, at 1103)

The home demonstrations referred to had been described by the Board in its earlier decision as "disgraceful spectacles of mob proportions, with as many as 400, 500, and even 700 persons assembled" at the homes of non-strikers, during which "vile names and insults, derisive epithets, and even threats were shouted out at them." (128 NLRB at 1106)

The employment office picketing referred to had been described by the Board in its earlier decision as conduct in which the pickets would repeatedly "interpose themselves between the approaching applicants and the entrance to the employment office" so as to prevent access. The Board also found that "Frequently there were instances when groups of pickets actively blocked, pushed, shoved, bumped, spat upon, tripped, kicked, and otherwise impeded the entrance of persons into the employment office." (128 NLRB at 1107)

2. The Board also ordered reinstatement of those "(1) actively engaging in halting, encircling, blocking, shouldering, and bumping of nonstrikers or job applicants during the mass picketing or employment office picketing; (2) verbally harassing, insulting, and abus-

ing nonstrikers at the picket line, their homes, business establishments, or places of amusement; (3) participating in inspecting railroad cars leaving Respondent's plant or attempting temporarily to halt certain trucks leaving Respondent's plant." (Supp. J.A. 2360-2361)

The only employees denied reinstatement by the Board were 17 strikers who engaged in "physically and violently assaulting nonstrikers or threatening members of nonstrikers' families." (Supp. J.A. 2360, 2366) The Board reasoned that it should not enter a reinstatement order as to these employees because of "the encouragement such misconduct would receive, with the possible disorder and instability which such encouragement might induce in collective bargaining, were we to order them reinstated. Accordingly, we find that it would not effectuate the policies of the Act to reinstate those strikers who engaged in the above-described acts of violence or threats of physical harm." (Supp. J.A. 2366)

From the time of this Court's decision in *NLRB* v. *Fansteel Metallurgical Corporation,* 306 U.S. 240 (1939) up to the present case, it has been uniformly held by the Board and the courts that illegal, tortious and improper conduct of the kind engaged in by the 90 employees involved here is cause for discharge even when committed in the course of concerted activity in a labor dispute and precludes an order of reinstatement. The leading cases are cited in the Petition in the present case and are not repeated here. This long line of holdings was based on the sound premise that it is the policy of the National Labor Relations Act to provide peaceful and orderly means of settlement of labor disputes as a substitute for the use of force and

violence and other illegal conduct. As this Court put it in the *Fansteel* case:

> "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights." 306 U.S. at 257-258.

This policy was reiterated and emphasized by Congress in the Labor Management Relations Act, 1947. That Act's Declaration of Policy states that employers, employees, and labor organizations must "above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." It further declares that "It is the purpose and policy of this Act . . . to provide orderly and peaceful procedures . . . and to protect the rights of the public."

The 1947 Act further reinforced this policy by adding a new provision in Section 10(c) of the National Labor Relations Act that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." As explained in the House Conference Report (Report No. 510 on H.R. 3020, p. 59, Legislative History of the Labor Management Relations Act, 1947, p. 563), the cause for discharge referred to in this provision included "violence, mass picketing, unfair labor practices, contract violations or other improper conduct" and the provision "applies with equal force whether or not the acts constituting the cause for discharge were

committed in connection with a concerted activity." Ibid., Report p. 39, Legislative History, p. 543.

In departing from the policy of the Act in the present case, the Board adopted a new and different policy—a sort of "comparative negligence" doctrine—of balancing the conduct of one party against that of the other. It said "we have carefully balanced or weighed" the employees' conduct against the company's conduct and "we conclude that the latter outweighs the former." (Supp. J.A. 2358) This is another instance of usurpation by the Board of "authority to define national labor policy by balancing the competing interests of labor and management" and of making "a judgment as to the proper balance to be struck between conflicting interests . . . which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress" which this Court recently condemned in *American Ship Building Company* v. *NLRB,* 380 U.S. 300, and *NLRB* v. *Brown,* 380 U.S. 278.

Even in making this departure, the Board still recognized that it lends "encouragement" to employee misconduct "with the possible disorder and instability which such encouragement might induce." (Supp. J.A. 2366) In this case and in *Oneita Knitting Mills, Inc.,* 153 NLRB No. 4, decided subsequently, it apparently considered it proper to encourage and condone any misconduct less than "aggravated assault." In the *Oneita* case it was suggested by the Trial Examiner, whose findings, conclusions, and recommendations were adopted by the Board, that the line might be drawn at "homicide or mayhem." Trial Examiner's Decision, p. 16, line 24.

In an even more recent decision, the Board made it clear that it now considers this new doctrine "well-

settled" and intends to follow it in future cases. Thus it stated, "It is well-settled that employees who strike as a result of an employer's unfair labor practices are entitled to have any unprotected conduct which they may have engaged in during the course of such a strike balanced or weighed against the employer's unlawful conduct which provoked or, as here, prolonged their strike. *N.L.R.B.* v. *Thayer Company,* 99 NLRB 1122, 1125, enfd. as modified, 213 F. 2d 748 (C.A. 1), cert. denied 348 U.S. 883; *Kohler Co.,* 148 NLRB No. 147." *Quality Limestone Products, Inc.,* 153 NLRB No. 93, released July 4, 1965.

This apparently represents a return to an early Board doctrine which was expressly repudiated by Congress in 1947—a doctrine under which "the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement." House Conference Report No. 510 on H.R. 3020, p. 39, Legislative History of the Labor Management Relations Act, 1947, p. 543.

This new policy not only exceeds the Board's authority; it would be wrong even if it were within the Board's authority because it encourages the very "resort to force and violence in defiance of the law of the land" which this Court condemned in the *Fansteel* case.

The Board's new policy of balancing conduct puts aside the orderly processes of the law and encourages the parties to disregard the peaceful procedures provided by law and resort to retaliatory actions meeting violation with violation, force with force, and violence with violence. That is not in accord with the National Labor Relations Act or any other law of the land.

It is a matter of common knowledge that it is difficult at best for state and local police authorities to maintain law and order during strikes, picketing and other labor disputes. Local authorities deserve every help and cooperation from the Federal law which has preempted the field of labor relations. They do not deserve the sabotaging effects of the policy adopted by the Board in this case which lends encouragement to mass picketing, mob demonstrations, disorderly conduct and violence.

The Board's new policy of balancing conduct, as practiced in the present case, also seems to introduce elements of staleness that contravene at least the spirit of the six-month limitation on the issuance of unfair labor practice complaints which Congress added in Section 10(b) of the Act in 1947. Congress was concerned that matters were being brought up "years after an unfair labor practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." House Report No. 245 on H.R. 3020, p. 40, Legislative History of the Labor Management Relations Act, 1947, p. 331. In its initial consideration of the present case on an identical record, the Board was unable to discern any unfair labor practice by the company that would make the strike an unfair labor practice strike from the beginning. In its Supplemental Decision on remand, it had to go back to labor strife as early as 1933, two years before the National Labor Relations Act was enacted, to find support for finding an unfair labor practice in 1954 to justify reinstatement of employees discharged for misconduct in 1955. Thus, the doctrine seeks to perpetuate the effects of labor disputes rather than to put them to rest as Congress intended.

Employers have a genuine interest in developing and maintaining good employee relations, good community relations, and good industrial climate in the communities where they operate. The Board's new policy is in derogation of an employer's right to maintain order and discipline, since it throws a cloak of immunity over unlawful and improper conduct of employees if committed in connection with concerted activity, and prevents discharge for such conduct. It is in derogation of an employer's right to operate during a strike, since it permits pickets to prevent workers from entering the plant. It is in derogation of the right of individual workers who may wish to refrain from striking and continue to work. It induces lawlessness and disorder in the community and affects not only the ability of the employer to operate in the community, but also the reputation of the community and the employer.

CONCLUSION

The decisions of the Board and the lower court in this case adopt a new labor relations policy that is inconsistent with the intent of Congress and the provisions of the National Labor Relations Act, conflicts with the decisions of this Court and other courts, exceeds the authority of the Board and the lower court, and has far-reaching effects upon the labor relations of industry generally.

We therefore respectfully urge that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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